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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 253.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
v.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR RESPONDENTS, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 876, IN OPPOSITION TO PETITION OF THE NATIONAL LABOR RELATIONS BOARD FOR A WRIT OF CERTIORARI.

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OPINIONS BELOW.

The Opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 52 to 56), filed June 28, 1939, is not yet reported. It may be found in the Labor

Law Service published by Commerce Clearing House, Inc., Court and Board Decisions Supplement, [¶18,390], upon pages 18,394 to 18,396, Report 70, July 7, 1939. The Supplemental Decision and Second Direction of Election of the National Labor Relations Board (R. 21 to 25), entered and issued by the Board on March 1, 1939, are reported as 11 N. L. R. B., No. 63. The Decision and Direction of Election of the National Labor Relations Board entered and issued by the Board on November 8, 1938 (R. 36 to 44), as amended November 23, 1938 (R. 45), are reported in 9 N. L. R. B. 742, and the Second Amendment thereto of December 22, 1938 (R. 46 to 49), is reported as 10 N. L. R. B., No. 65.

QUESTIONS PRESENTED.

In its Petition for Certiorari (pp. 2-3), the National Labor Relations Board, in its statement of the questions presented to this Honorable Court for decision, specifies two questions, each of them in abstract and superficial form, not as the questions involved in this cause were presented to and argued before the Court below by the parties, and not in such form as to express the actual and essential questions presented.

The actual questions presented to and decided by the Court below were:

1. Did the ballot prescribed by the Board's Order of March 1, 1939, for the directed so-called "Election" by the employees of the Consumers Power Company, deny and, in effect, destroy the highly important and vital right of said employees to the *Election, which the Act*, in its main policy and purpose, secures to them, to *select and designate representatives of their own choosing* for collective bargaining?

2. Whether, under and within the provisions of the National Labor Relations Act, the Circuit Courts of Appeals have jurisdiction to review and set aside an Order of the National Labor Relations Board, which finally and irreparably *denies* to *employees*, whose rights the National Labor Relations Act was passed to protect and secure, supremely valuable rights granted to them by the principal provisions of the Act and secured to them by the Fifth Amendment?

3. Are the Respondents (established and nationally recognized Labor Unions of employees) under Section 10 (f) of the National Labor Relations Act, as said Section, like all other provisions of the Act, is to be read and enforced so as to effectuate its predominant policy and purposes, entitled to judicial determination by the Circuit Courts of Appeals of basic and serious questions whether the National Labor Relations Board has *violated* the Act by Orders which, finally and beyond redress, deprive *employees* in large numbers of valuable rights granted to them, and secured against deprivation, by the Act itself, as well as by the Fifth Amendment?

STATUTES INVOLVED.

This cause involves questions arising under the National Labor Relations Act of July 5, 1935 (49 Stat. 449; U. S. C. Sup. II, Title 29, Section 151, *et seq.*). and under the Fifth Amendment to the Constitution.

STATEMENT.

The Statement contained in the Petition for Certiorari is, it is respectfully submitted, incomplete, and therefore the Respondents submit the following statement of the case.

The proceeding in the Court below was by Respondents' Petition to review and set aside the Board's Order, designated Supplemental Decision and Second Direction of Election (R. 21 to 26), entered on March 1, 1939.

The Respondents, as persons aggrieved by the Order, pursuant to Section 10 (f) and Section 9 (d) of the Act, complained of it as illegally and finally depriving them of supremely important rights granted them by the Act for their own benefit and protection and to secure and effectuate the dominant policy of the Act.

The Board filed a Motion (R. 32 to 35) to dismiss the Petition, thus admitting, for the purposes of the proceeding, all allegations of said Petition for Review upon which the relief it prayed was based. On May 10, 1939, the case came on for final hearing before the Court below on the Board's said Motion to Dismiss, and was fully briefed and argued upon the merits by counsel for both sides (R. 51, 56). On June 28, 1939, the Court below entered its Order setting the Board's Order aside (R. 51, 56).

The membership of the Respondent, the Brotherhood Local, consists of a large portion of the employees of the Consumers Power Company, an operating public utility corporation furnishing electric current and power in Michigan. The Brotherhood Local is a constituent of the Respondent, the International Brotherhood, affiliated with the American Federation of Labor. Other employees of the Company belong to a purported labor organization, known as Utility Workers Organizing Committee, affiliated with the CIO.

On February 2, 1938, the Respondent, the Brotherhood Local, petitioned the Regional Director of the Board at Detroit, Michigan, requesting the holding of an election by the employees of the Company for the purpose of selecting a representative of their own choosing for collective bargaining with the Company. After considerable delay on the part of the Board, on December 22, 1938, it entered a Decision and Direction of Election (amendatory of previous Decisions and Directions of Elections issued theretofore in said proceedings on November 8, 1938, and November 23, 1938, respectively), directing the Regional Director, within seventy days from November 8, 1938, to conduct an election by secret ballot among certain specified employees of the Company, to determine whether such employees desired to be represented by the Respondent, the Brotherhood Local, affiliated with the American Federation of Labor, or by Utility Workers Organizing Committee, affiliated with the Congress for Industrial Organization, for the purpose of collective bargaining, or by neither.

The following were the results of that election held January 10-13, 1939:

Total number of employees eligible	2,977
Total number of ballots cast	2,806
Total number of votes for International Brotherhood of Electrical Workers, Local 876	1,072
Total number of votes for Utility Workers Organizing Committee	1,164
Total number of votes for neither	506
Total number of challenged ballots	52
Total number of blank ballots	1
Total number of void ballots	11

Neither union having received a majority of the votes validly cast in the election, there was no representative elected.

On February 2 and February 6, 1939, the CIO Union requested the Board to direct a run-off election to be expressly limited to *only* a choice *for or against the CIO Union*, and on February 8, 1939, the Board notified the Respondents that the Board would direct the holding of such a run-off election unless objection thereto was received within five days thereafter.

On February 11, 1939, the Respondents, through their General Counsel, informed and notified the Board, by letter and petition (see Respondents' Exhibit No. 1, R. 17 to 20), that they had no objection to the run-off election, if the contestants or candidates named upon the ballot used in the election were the two organizations, namely, the CIO Union, and the Respondent, the Brotherhood Local, which, respectively, had received the highest and the next highest number of votes in the election of January 10 to 13, 1939; further, that such condition was apposite and important with respect to the proposed run-off election, because intimations had been made, and rather widely circulated, by the CIO Union, that it only or it and "Neither", would appear upon the ballot, without the name of the Respondent, the Brotherhood Local, appearing at all, whereby the employees would be deprived of voting for said Respondent, and such "election" of a collective bargaining agency to represent the employees of the Company would *not be an election at all* between the principal and real contestants, who embraced decidedly the greater number and substantial body of the employees, and between whom the real contest for the choice of the collective bargaining agency

lay. And Respondents, further therein, requested and petitioned the Board that the run-off election be held in the manner so requested by them. Respondents objected to the election as suggested by the Board, which, if so held, *would utterly deny and deprive them of their rights to participate in an election for the choice of a collective bargaining representative, as provided for and secured to them by the National Labor Relations Act, as well as by their fundamental legal rights.* Respondents, further in said writing, requested an opportunity to be heard by the Board if it entertained any doubt as to the propriety of Respondents' position.

The Board, after oral argument before it on the question of including Respondent, the Brotherhood Local, as a contestant and candidate on the ballot in the contemplated election, entered, on March 1, 1939, its final Order, called Supplemental Decision and Second Direction of Election (R. 21 to 25), denying the request of, and the relief sought by, the Respondents in their letter and petition of February 11, 1939, and in the argument on their behalf to the Board.

By its said Supplemental Decision and Second Direction of Election of March 1, 1939, the Board ordered a so-called "election", *in which the employees in the appropriate unit should be given the opportunity to decide "whether or not they desired to be represented by U.W.O.C" (the CIO Union)*; that such an *election by secret ballot* be conducted within forty-five days from the date of said Order, *to determine whether or not they desired to be represented by Utility Workers Organizing Committee (the CIO Union)* for the purposes of collective bargaining.

On March 15, 1939, the Board notified Respondents that the said alleged election would be conducted on April 11, 12, 13 and 14, 1939.

On April 5, 1939, Respondents, claiming to have been aggrieved by the Order, as stated hereinabove, petitioned the United States Circuit Court of Appeals for the Sixth Circuit to review the Order and set it aside, and requested said Court to stay the "election" directed and ordered to be held, as aforesaid, until the final determination of the matters and questions raised in and by their Petition, which stay was, by said Court, granted on April 10, 1939 (R. 50).

The Circuit Court of Appeals, on June 28, 1939, set aside the Order complained of; and the Board, on August 1, 1939, filed its Petition in this Honorable Court praying that a Writ of Certiorari issue to review and reverse the judgment of the Court below.

On behalf of the Respondents, and in opposition to the Petition of the Board for a Writ of Certiorari it is respectfully submitted, and will be hereinafter more fully urged, that the Petition of the Board for a Writ of Certiorari should be denied because the Court below, in its said decision, did not err in any of the particulars specified by the Petitioner, or otherwise, but correctly decided the questions presented by the case; and because the several and various prerequisites to certiorari do not obtain in this case.

ARGUMENT.

I.

The Decision of the Court below is not, as claimed by Petitioner, in conflict with the decisions of other Courts of Appeals. None of such other decisions, cited by Petitioner, involved or presented circumstances or questions essentially similar to those in this Case, which involve an Order by which the Board illegally and finally deprived Employees of the right to select, by Election, Representatives of their own choosing for Collective Bargaining—the Cardinal Right given Employees by the Act for their own benefit and protection and to effectuate its avowed policy.

The Petitioner urges upon this Court that the decision of the Court below is in conflict with the decisions of other Courts of Appeals, citing four decisions of other federal appellate Courts and one of the Court below. All of those decisions involve the question of the review, under the Act, of *certifications* issued by the Board, and none of them involves or presents circumstances or questions analogous to those in the instant case.* The admitted facts support this differentiation.

The Board's Order of March 1, 1939, which the Court below set aside, directed an "election" by the employees of the Company of a representative for collective bargaining, *and specifically ordered and required the use at the "election" of a secret ballot from which the name*

* One of the cases cited by the Board, *Unlicensed Employees of Sabine Transportation Co. v. National Labor Relations Board*, (C. C. A. 5), decided November 12, 1937, without opinion, is unreported, and the Respondents have been unable to ascertain either the questions presented therein or the reasons for the dismissal of the proceedings. The meager statement of the case in *Commerce Clearing House, Labor Law Service*, referred to by Petitioner, throws no clear or real light on that case.

of the Respondent, the Brotherhood Local, was to be entirely excluded and omitted, and upon which *only* the name of the CIO Union was to appear, so that the electors *had to vote solely and exclusively for or against the CIO Union, with no other or alternative expression or choice*. This requirement of the Board, which was promulgated under Section 9 (c) of the Act, was characterized by the Court below as follows (R. 54):

> "We think the order was *illegal* and that the proposed election was unfair in effect. It was in the teeth of the policy formulated in the statute, that the employees should be protected in the exercise of full freedom of designation of representatives of their own choosing. The employee was not given full freedom of choice. If he voted he could either ratify or reject the nominee of the Board, but if he rejected it he was through. He had no alternative—he could not choose for himself. He could take the representative offered him or none at all—a parallel of Hobson's choice."

The Petitioner, in its attempted analogy between the circumstances in the decisions cited by it and those in the instant case, as well as in its argument generally throughout its Petition for Certiorari, misses and disregards the essential point of the whole matter, namely, the *harmful illegality* of the Order, which was in *perversion and denial of the right of an election*, as contradistinguished from an order providing *for an election*, or a certification of facts or findings based upon an *election*. The *denial* of an *election*, under the pretense that an election is being provided for and secured, whether under the mask of an investigation or a certification, is a wrong operating instantly and finally to the injury and prejudice of the employees in question.

and, if not arrested and remedied, inflicting permanent and irreparable injury upon such employees. The Petitioner's claims in this case, which would usurp and appropriate the powers and functions of judicial review by the Courts of Appeals, and oust and exclude said Courts from control and remedy, under the Act, of any and every illegality which the Board may perpetrate *against employees*, as distinguished from employers, are, it is respectfully submitted, plainly as intolerable as they are untenable.

Petitioner cites, as being in conflict with the decision in the instant case, *Combustion Engineering Co. v. National Labor Relations Board*, 95 F. (2) 996, in which the Court below on March 18, 1938, in a memorandum decision, dismissed a petition for review of an order of the Board. No reasons are assigned by the Court below in said memorandum decision for its action, but it is apparent, merely from the title of that case, that relief was there sought by a *company or employer*, and not by employees in an effort to protect themselves against infringement of their supremely important and specifically guaranteed rights, *fundamental in their nature*, under the Act, as here. Moreover, and importantly, as will be shown in the discussion herein upon the intent of Congress as evidenced by the Congressional Reports referred to in the Board's Petition, it seems plain that whatever limitations were intended by Congress to be placed upon the right to judicial review, under the Act, were intended to be placed upon the right of *employers* to such review, and not upon the right of *employees* to the review of *illegal* orders of the Board depriving such *employees* of their rights to their final and irrepara-

ble injury. As the Court below, on this point, said (R. 55):

> "In this situation (where no unfair labor practice is involved), does this court have jurisdiction to review the order complained of, which as we have pointed out, *destroys* the right of petitioners, guaranteed by Sec. 7 of the Act, in the exercise of full freedom to bargain collectively with the Company through representatives of their own choosing? We think it does. *We cannot think that the Congress overlooked this important matter.* * * * This essential property right was not only guaranteed but was safeguarded; otherwise the Act itself would be subject to serious inquiry as to whether it violates the due process clause of the Fifth Amendment."

Cupples Company Manufacturers v. National Labor Relations Board, 103 F. (2) 953 (C. C. A. 8), (which relies for its holding upon *American Federation of Labor v. National Labor Relations Board*, 103 F. (2) 933, and *United Employees Ass'n. v. National Labor Relations Board*, 96 F. (2) 875, all three of which cases involve *certifications* of the Board and are cited by Petitioner as being in conflict with the decision below) plainly concerns a situation totally unlike that presented here because there no element of *impropriety or illegality* was alleged in or in connection with the order of the Board therein which "directed that as a part of the investigation to ascertain representatives for the purpose of collective bargaining, an election by secret ballot should be conducted at such time as the Board might specify, among the employees in a unit found by the Board to be appropriate for purposes of collective bargaining". *Without anything whatever* in the *Board's Order* to indicate any element of *illegality, deprivation*

or prejudice with reference to either employer or employees, the Court in that case could hardly escape the conclusion that the investigation, *as to which no impropriety of any sort was complained of or revealed*, had not reached the state of a final order directed against the Petitioner, *the employer*, and that, until it had reached that stage, the *petitioning employer* was not entitled to a review or hearing in that Court.

The *United Employees Association* case, *supra*, likewise furnishes neither indication nor suggestion of *illegality* on the part of the Board, and, both in the questions presented and the facts involved therein, is totally unlike the instant case. There the petitioner for review was a labor organization *already under a bargaining agreement with the employer*, and the *certification* of a rival organization, which was the act of the Board complained of, did *nothing*, in itself, to change the existing relationship between the petitioner and the employer. And, in the real and genuine election there held, *the rival union actually had received a majority of the votes of employees designated as having been eligible to vote.*

The decision of the Court of Appeals for the District of Columbia in the *American Federation of Labor* case, which is pending in this Court on Petition for Certiorari,* clearly is based upon the supposed analogy of cases dealing with the Urgent Deficiencies Act, which, it is submitted, are not applicable to cases dealing with administrative acts, as here, where provision for review

* Subsequent to the rendition of the judgment in the instant case on June 28, 1939, the Board filed a Memorandum in *American Federation of Labor, et al., v. National Labor Relations Board*, No. 70, October Term, 1939, in which the Board, although contending that the decision of the United States Court of Appeals for the District of Columbia was plainly correct, nevertheless states that it joins in the Petitioners' request that a Writ of Certiorari be granted.

is made *within the Act itself*. That case cites, as authority for its holding that the certificate of the Board there was not reviewable, *Shannahan v. United States*, 303 U. S. 596, which case, together with *United States v. Los Angeles & Salt Lake R. Co.*, 273 U. S. 299, both involving the Urgent Deficiencies Act, were rejected as unauthoritative in *Pacific Power & Light Co. et al. v. Federal Power Commission*, 98 F. (2) 835 (C. C. A. 9) which was affirmed by this Court in *Federal Power Commission v. Pacific Power & Light Co., et al.*, 307 U. S. 156, and it also relies upon *Shields v. Utah Idaho Central R. Co.*, 305 U. S. 177, which likewise dealt with an order of the Commerce Commission. It is submitted that, exclusive of the obvious factual differences between the *American Federation of Labor* case and the instant case, which are hereinafter pointed out, the holding in the former case has been overruled by the decision of this Court in the *Pacific Power & Light Company* case (and in *Rochester Telephone Corp. v. United States*, 307 U. S. 125, and *United States v. Maher, etc.*, 307 U. S. 148), which makes a clear distinction between the scope of the review of orders of administrative boards under administrative acts containing *in themselves* provisions for such review, and the Commerce Act, which does not, and whose orders must be reviewed under the Urgent Deficiencies Act. And other arguments may be advanced to show such distinction, for example, that the review afforded by the Urgent Deficiencies Act is limited to cases of public interest (see *Griffin v. United States*, 303 U. S. 226, 234); that while the regulatory authority of the Commerce Commission is general and comprehensive, *that of the National Labor Relations Board is defined and limited by the scope and provisions of the Act*; and that as the

congressional committees must have been familiar with the terms of the Commerce Act, containing no provisions for review of orders of the Interstate Commerce Commission, and the limited review of such orders afforded by the Urgent Deficiencies Act, it was intended in the National Labor Relations Act to provide for a new and more comprehensive review of administrative orders representing a distinct departure from the Urgent Deficiencies Act.

Referring to the factual distinctions between the *American Federation of Labor* case and the one at bar, it should first be noted that the main contention of the petitioning unions there was as to the designation by the Board of the appropriate unit for purposes of collective bargaining, *which the Board is, by Section 9 (b) of the Act, expressly given full discretionary powers to determine.* But the cardinal distinction between the situation in that case and the one at hand, in view of the authorities hereinafter cited which establish that the finality of an order for purposes of its review is determinable by consideration of the extent to which rights are denied or abridged thereby, is that *there the successful union actually embraced in its membership a majority of employees eligible to vote in the unit designated as the appropriate one.* In other words, in that case the certificate issued by the Board did not abridge the rights of the petitioning unions to represent employees in collective bargaining, as did the Second Direction of Election here, because the successful union there was actually preferred by a majority of the eligible employees, whilst in the instant case the *right* of Respondents *to represent* employees of the Company was, by said Second Direction of Election, *completely and finally*

precluded in spite of the determination, at the original election, that the CIO Union represented less than a majority of eligible employees and less than a majority of those voting.

Nothing but an utter confusion of thought could *compare*, or fail to *contrast*, the situations in the cases cited by the Board, as being in conflict with the Court below, with the circumstances involved here, or the *certifications* in those cases with the *Order* complained of herein, which allowed only a strictly limited *veto* in lieu of an *election*—the whole thing a contraption which illegally *denied* an election, instead of legally *permitting* one.

The Board, in its Petition for Certiorari (p. 10), in reliance upon the holdings in the several *certification* cases which it cites, argues that: "If a certification—the final step in a representation proceeding—is not reviewable, a *direction of election*, which is a preliminary instruction by the Board to its own subordinate officials to take certain proceedings as part of the investigation concerning representation, *a fortiori*, is not reviewable". That position of the Board *herein* is manifestly both *inapposite* and *fallacious*, because the Board's Order was *not* a "*direction of election*," but the *denial and prevention* of an *election*—the fundamental right guaranteed to employees by the Act. And aside from that and other fallacies in the Board's position on this point, shown herein, another obvious and decisive answer to it is given in the Opinion of the Court below, wherein it is said (R. 55):

> "Respondents insist that the order is not final, but it *was final not only in its effect* but *in that it was the last order to be made under the procedure set out in the Act for the determination of represen-*

tatives of employees for the purposes of collective bargaining with the Company. It is true that if the election had been held it was the duty of the Board to certify the result; *but a certificate is not an order.*"

II.

The so-called "Election" by a ballot eliminating the Brotherhood Local and restricting the Employees to vote only for or against the CIO Union, is not an Election within the meaning of the Act, and the Order directing it illegally deprived Respondents and their members of rights dominantly provided for their benefit and protection by the Act, and for the effectuation of its purposes, and secured against deprivation by the Act and the Fifth Amendment.

The Board's Order *specifically prescribed and required the use, at the "election", of a secret ballot from which the name of the Respondent, the Brotherhood Local, was to be entirely excluded and omitted* and upon which *only* the name of the CIO Union was to appear. so that the electors would have to vote solely and exclusively for or against that Union, with no alternative choice. Of the whole number of 2,977 voters in the appropriate unit, *all* who did not wish to vote for the CIO Union, *including all who did wish to vote for the Brotherhood Local,* were reduced and restricted to a *mere veto* of the CIO Union, and were depriyed of the essentials of the right of real *election.*

This one-sided, unfair and discriminatory contrivance would have *permitted* some voters *to* express their choice, and *prohibited* large numbers of other voters *from* expressing their choice. The very large number of those so discriminated against by the prohibition of

an expression of choice upon their part is manifested by the fact that at the last preceding election there were 2,977 eligible voters, of whom 1,164 voted for the CIO Union, 1,072 for the Brotherhood Local, 506 for Neither, and the balance, 235, cast either no ballots at all or ineffective ballots.

The Board's Order, excluding and outlawing all those employees and voters in the appropriate unit who might want to vote for the Brotherhood Local, thus clearly terminated and destroyed the right of the Brotherhood Local to represent its members and other employees of the Company in collective bargaining, and the right of the members of the Brotherhood Local, who constitute a large and substantial portion of the employees of the Company, as well as other employees, to vote for it as their representative. In these respects the Board's Order plainly took away the *personal rights* of Respondents and their members, as well as those rights which this Court, in *Texas and New Orleans Railroad Co. v. Brotherhood of Ry. & S. S. Clerks*, 281 U. S. 548, 571, adjudicated to be *property rights*.

Dr. Francis Lieber's luminous discussions of this subject, with historic illustrations, in his classic, *Civil Liberty and Self-Government*, are forcibly in point. See pages 392; 393; 420, 421; 434; 435.

In the First Annual Report of the National Labor Relations Board, for the Fiscal Year ended June 30, 1936, referring to the National Labor Relations Act and particularly its "Policy and Provisions", at page 9, the Board declares that "The Act, in its substantive and procedural provisions * * * makes *no departure from traditional*

principles of substantive law or statutory administration". And referring to the rights of employees guaranteed by Section 7, to self-organization and to bargain collectively through *representatives of their own choosing*, etc., and to the provisions of Section 9, relating to representatives and elections, it is further said by the Board:

> 4. Representatives and Elections. Since collective bargaining is carried on through *representatives* of employees, *the act follows established precedents for the factual determination of such representatives.* Section 9 (a) provides that *representatives selected by the majority of employees in a unit appropriate for collective bargaining* shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining. *The act thus affirms the majority-rule principle, which is inherent in the practice of collective bargaining as in the practice of dealing through representatives generally, whether for governmental, corporate or other purposes.*
>
> "Section 9 (b) authorizes the Board to determine in the appropriate case whether, *in order to secure to employees the full benefit of their right to self organization and collective bargaining, and otherwise to effectuate the policies of the act*, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.
>
> "In order to resolve in an orderly way doubts as to the representatives of employees, the Board is specifically empowered to investigate questions concerning the representation of employees, *to conduct elections in appropriate cases*, and to *certify* to the parties the *name or names of the representatives that have been designated* (Sec. 9 (c))."

And see also particularly Sections 1, 7 and 9 of the Act itself for its strong declarations on this subject.

It is submitted that the Act in conferring upon and vesting in employees in the appropriate unit the right to elect, and, in the exercise of such right of election, to choose, select and designate by a secret ballot of such employees, and by a majority of them, the exclusive representation of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment and other conditions of employment, and in expressly providing that the Board shall "*insure to employees the full benefit of their right to collective bargaining*", and in declaring it to be the policy of the United States, for the purposes of said Act, to encourage the practice and procedure of collective bargaining "by protecting the exercise by workers of *full freedom of * * * designation of representatives of their own choosing*, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection", and in again emphatically enacting in Section 7 that employees "*shall have the right * * * to bargain collectively through representatives of their own choosing* for the purpose of collective bargaining or other mutual aid or protection", intended as one of the principal, if not the principal, means of securing to employees the benefits, protection, security and relief designed by the Act in their behalf and in the general public interest, *that said employees should have free, full and unrestricted elective franchise, or suffrage, to be exercised by ballot, in the choice, selection and designation by them of their representatives for collective bargaining.* Moreover, it is clear that such elective franchise or suffrage, in its nature, scope and essentials,

and particularly in its fullness, freedom and unrestrictedness, and in its relation to the majority-rule principle, *is analogous to the elective franchise or right of* suffrage, as declared by the Report of the Board hereinbefore quoted, for "*governmental, corporate or other purposes*", and, with respect to which, as the Board's Report also states, "the Act, both in *its substantive and procedural provisions * * * makes no departure from traditional principles of substantive law or statutory administration.*"

It is thus plain that a predominant purpose of the Act, for the effectuation of its express policies, was *to insure, beyond denial or abridgement, upon the part of either employers or the Board itself, full, free and untrammeled action upon the part of said employees in the choice or election of their representatives for the supreme and vital purposes of collective bargaining.*

The plain, established meaning and import of the terms employed in the Act in this connection, namely, "choose", "select", "designate", "election", "ballot", "of their own choosing", "selected by the majority," "the full benefit of their right to collective bargaining", all consistently and uniformly lead to the one conclusion that the right of election so conferred was a right of *affirmatively choosing* by vote a person or organization to fill and exercise the office of representative for collective bargaining, and that when the voter or elector, as in this case, is deprived, in whole or in part, of his full right of exercising his own choice, selection and designation of the representative in question, he loses his elective franchise as the same is intended to be vouchsafed to him by the Act.

The *result and effect* of the Board's Second Direction of Election set aside by the Court below was that Respondents were *finally defeated and outlawed* at a previous election by the votes of far less than a majority of employees eligible to vote in the election.

This principle of majority, as against minority, rule, as maintained in the Act, has been recognized by the Board not only in the above quoted excerpts from its First Annual Report, but also in other expressions, as on page 108, in said Report.

That the Board would not afford recognition to an organization representing less than a majority of those eligible employees voting is likewise plain from *Matter of Associated Press*, 1 N. L. R. B. 686, where the Board said:

> "A majority of those eligible voted; a majority of those voting, though less than a majority of those eligible, voted for the American Newspaper Guild. In certifying the Guild we are following the rule established by the Circuit Court of Appeals for the Fourth Circuit in *Virginian Railway Co. v. System Federation No. 40*, decided June 18, 1938. The Court had before it the provision in the Railway Labor Act, 45 U. S. C. Sec. 131, *et seq.*, that: 'The majority of any craft or class shall have the right to determine who shall be the representative of the class or craft'. It decided that where a majority of the eligibles voted, a majority of those voting, though less than a majority of those eligible, determined the representative.
>
> "After pointing out that the popular democratic government is universally conducted upon that principle and alluding to the many decisions of the Supreme Court applying the principle to political elections, the Court says:

"'We see no reason why the Act should not be interpreted as contemplating that this well settled rule of elections should be applied in the case of the employees' election for which it provides, in cases like this where a majority of those qualified to vote participate in the election. Such a rule is fair and just to all parties. *It gives every employee an opportunity to express his choice.* It preserves the secrecy of elections. *And it prevents the breaking down of collective bargaining which it was the purpose of the Act to set up.*'

"With these reasons we are in entire accord. The parallel language in the National Labor Relations Act: 'Representatives designated or selected * * * by the majority of the employees in a unit' differs slightly but not materially from that in the Railway Labor Act and requires the same construction."

Virginian Railway Company v. System Federation No. 40, etc., referred to by the Board in its opinion above, was subsequently affirmed by this Court (300 U. S. 515) which, alluding to the majority-rule principle embodied in Section 2, fourth, of the Railway Labor Act, which section had been by the Board analogized to the parallel Section in the National Labor Relations Act, said, speaking through Mr. Justice STONE (p. 560):

"It is to be noted that the words of the section confer the right of determination upon a majority of those eligible to vote, but is silent as to the manner in which that right shall be exercised. Election laws providing for approval of a proposal by a specified majority of an electorate have been generally construed as requiring only the consent of the specified majority of those participating in the election. *Carroll County v. Smith*, 111 U. S. 556; *Douglass v. Pike County*, 101 U. S. 677; *Louisville & Nashville*

R. Co. v. County Court of Davidson County, 1 Sneed (Tenn.), 637; *Montgomery County Fiscal Court v. Trimble*, 104 Ky. 629, 47 S. W. 773. Those who do not participate are presumed to assent to the expressed will of the majority of those voting. *Cass County v. Johnston*, 95 U. S. 360, 369; and see *Carroll County v. Smith, supra.*"

It is thus clearly seen that what was actually done by the Board's Supplemental Decision and Second Direction of Election, in contravention of the majority-rule principle inherent in the Act, as the Board itself has construed it, was to allow on the ballot to be used at the "election" the name of *only* a labor organization which was definitely in the minority in the original election of January, 1939, and to exclude and omit the Respondent, the Brotherhood Local, which was in precisely the same minority class as the CIO Union as the result of said original election, thus denying to said Respondent, and depriving it and its members of, their rights expressly guaranteed to them by the Act and by the due process clause of the Fifth Amendment.

III.

Definition of an Election and its Essentials.

In the Standard Law and General Dictionaries and in numerous Judicial Decisions, the following definitions are given:

Black's Law Dict. (2nd ed.), p. 415: "Election. The act of choosing or selecting one or more *from a greater number* of persons, things, courses or rights. * * * "The selection of one man *from among several candidates to* discharge certain duties in a state, corpora-

tion, or society. *Maynard v. District Canvassers*, 84 Mich. 228, 47 N. W. 756; *Brown v. Phillips*, 71 Wis. 239, 36 N. W. 242; *Wickersham v. Brittan*, 93 Cal. 34, 28 Pac. 792."

The Encyclopedia Britannica, 11th edition, vol. IX, title Election, page 169: In "the legal sense it is confined to the selection by the preponderating vote of some properly constituted body of electors of one *of two or more candidates*, sometimes for admission only to some private social position (as in a club), but more particularly in connection with public representative positions in political government."

See also to the same effect:

Bouvier's Law Dictionary (1926 ed.): "Election."

20 Corpus Juris, Elections, p. 55.

Webster's Twentieth Century Dictionary, p. 541: "Election."

Worcester's Dictionary of the English Language (1888), p. 409: "Election."

The New Century Dictionary (1927): "Election."

State v. Hays, 91 Miss. 755, 45 So. 728, (citing *Foster v. Scarff*, 15 Ohio 532).

Brown v. Phillips, 71 Wis. 239, 36 N. W. 242 ("the act of selecting one or more from others").

Hudgins v. State, ex rel. A. T. Hicks & Co., 145 Ala. 499; 39 So. 717 ("the act of electing one or more from others").

State v. Cahill, 131 Iowa 155; 105 N. W. 691 ("the choice or selection of *one man amongst more* to fill a certain office").

Maynard v. Board of Dist. Canvassers, 84 Mich. 228; 47 N. W. 756.

Bowler v. Eisenhood, 1 S. D. 577; 48 N. W. 136 (*"the selection of one man from amongst more* to discharge the duties in a state, corporation, or society").

Wickersham v. Brittan, 93 Cal. 34; 28 Pac. 792.

State v. Hirsch, 125 Ind. 207; 24 N. E. 1062.

People v. Board of County Canvassers of Onondaga County, 129 N. Y. 395; 29 N. E. 327.

People v. Crissey, 91 N. Y. 616, 634-635 (the Court declared that the person voted for was not elected, saying *"an election implies opportunity to re-elect or choose another, and such was not given. It is a misnomer to call such a proceeding an election"*).

IV.

An Election to be legal and valid must be free, fair and untrammeled; must be impartial, equal and undiscriminating with respect to the electors and their rights, and must not deny, abridge or impede the full exercise and enjoyment of their suffrage.

In *Cooley's Constitutional Limitations* (8th ed.), at page 1370, *et seq.*, it is said:

> "All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void. * * *
>
> "The mode of voting in this country, at all general elections, is almost universally by *ballot*. * * * The system of ballot voting rests upon the idea that *every* elector is to be *entirely at liberty* to vote *for* whom he pleases and with what party he pleases.

and that no one is to have the right, or be in position, to question his independent action, either then or at any subsequent time.

In *People v. McCormick*, 261 Ill. 413, 103 N. E. 1053, Ann. Cas. 1915 A, 338, the Court said:

> "Since the constitution has declared that all elections shall be free, each elector is *entitled* to cast his vote *for* any eligible person for any office provided by the Constitution *free from any restraint* not authorized by the Constitution itself. The legislature may determine the manner of conducting elections and the means of ascertaining and declaring the result, *but it has no right to interfere with the freedom of choice, which is the meaning of freedom of election. It is essential to the freedom of elections mentioned in the Constitution that every voter shall be permitted to choose from all eligible persons and shall not be required to choose from certain classes.*"

In the leading case of *State v. Dillon*, 32 Fla. 545, 14 So. 383, 22 L. R. A. 124, it was held that "in requiring an official ballot, the voter cannot be restricted to the candidates whose names are printed. He must be allowed to vote for whom he pleases."

And see the exhaustively considered case of

Jackson v. Norris, 173 Md. 519, 195 Atl. 576, and cases cited.

And also:

20 *Corpus Juris, Elections*, pp. 62 and 140.
10 *Amer. and Eng. Enc. of Law*, p. 576.
Page v. Allen, 58 Pa. St. 338.
Atty. Gen. v. Detroit, 78 Mich. 545.

V.

The settled and familiar Principles declared in the aforegoing Authorities have been expressly applied to the Elections of Representatives secured to Employees in the Federal Labor Acts.

In *Virginian Railway Company v. System Federation No. 40*, 84 F. (2) 641 (C. C. A. 4), affirmed by this Court in 300 U. S. 515, it is said, in the Opinion of the Circuit Court of Appeals:

> "One purpose of the Railway Labor Act, as amended, was to assure *free and untrammeled* action on the part of the employees in the *choice of their representatives* for the purpose of *collective bargaining*.
>
> "The *right* of self-organization and *representation* in the matter of rates of pay, hours of labor, and working conditions is a *property right*, the loss of which would result in irreparable damage to complainants. *Texas and N. O. R. Co. v. Brotherhood of Ry. and S. S. Clerks*, 281 U. S. 548.
>
> "It (the Act) merely prescribes the political principle of majority rule. Another section of the Act provides the means of determining the majority, *the political device of the secret election. * * * The universal rule as to elections of officers and representatives is that a majority of the votes cast elects*, and that those not voting are presumed to acquiesce in the choice of the majority who do vote. * * * Such a rule is fair and just to all parties. *It gives every employee an opportunity to express his choice.*"

In *National Labor Relations Board v. A. S. Abell Co.*, 97 F. (2) 951 (C. C. A. 4), the Court said:

> "The *choice* between Union and Committee was presented to the men; *its free exercise was guaran-*

teed in the 'right to self-organization' and '*to bargain collectively through representatives of their own choosing*' conferred by Section 7 of the Act, 29 U. S. C. A. sec. 157".

VI.

The Board's Second Direction of Election, denying rather than providing for, a Legal and Valid Election by the Employees of the Company, and operating definitively and destructively upon Respondents' rights, secured to them by the Act, and protected against any infringement by the Fifth Amendment to the Constitution, is a final Order, judicially reviewable as such under Section 10 (f) of the Act.

A.

As the Act, itself, fully demonstrates that the Employees' right of collective bargaining, through representatives of their own choosing, is the Act's principal and predominant purpose and means of effectuating it, and that the prevention of the proscribed unfair labor practices is integrally connected with and essentially ancillary to said principal and predominant purpose, it follows that the broad provisions for judicial review, under Section 10 (f) of the Act, properly and necessarily include jurisdiction and control by such review of orders of the Board destroying said major right of employees to collective bargaining in violation of said purpose of the Act.

The avowed Policy and Purpose of the Act, its Provisions and their correlation, and the settled Canons of Statutory Construction, it is respectfully submitted, fully sustain the interpretation of the Act stated above.

The National Labor Relations Act in all its parts and provisions, the public statement of President Roosevelt when he signed the Act, the reports and declarations of the Board, and the decisions of this Court, demonstrate the integral connection and relationship between the provisions of the Act securing to employees collective bargaining through representatives of their own choosing, as the Act's predominant purpose and effectuating means, and the prevention of impediments to that purpose consisting of the unfair labor practices which the Act proscribes, the prevention of which is ancillary to the Act's said principal purpose of maintaining an unprejudiced right to collective bargaining, and indicate the unity and indivisibility of the Act in its policy, intent, substance and remedial provisions, and establish beyond doubt, that in all the unfair practices, which it prohibits, the protection and security of collective bargaining are, directly or indirectly, involved; or *e converso*, the maintenance of the Act's cardinal objective and remedy of collective bargaining involves and requires the prevention of the denounced unfair labor practices. In other words, the policy, intent, substance and structure of the Act and the plainly designed coherence and adaptation of all its provisions to the supreme and general object and remedy which it repeatedly avows, show that the broad remedial jurisdiction vested by the Act in the Circuit Courts of Appeals, by judicial review, to confine the Board's orders within the Act and the fundamental law, properly and necessarily includes jurisdiction and control, by such review, of the Orders of the Board, not only with reference to the prohibited unfair labor practices, *but also with reference to the major and supreme right of the employees to collective bar-*

gaining through independent representatives of their own free choosing. Any other construction would be protecting by judicial review and control the incidental and auxiliary right of the employee as against the employer, whilst abandoning and leaving wholly unprotected, and without judicial protection and redress under the Act, the principal and vital right of the employee (the very right to which the suppression of the unfair labor practices is incidental and auxiliary) as against the Board itself.

The *President of the United States*, on approving the Act (see footnote, p. 9, of the Board's First Annual Report), made the following statement:

> *"The Act defines, as part of our substantive law, the right of self-organization of employees in industry for the purpose of collective bargaining, and provides methods by which the Government can safeguard that legal right.* It establishes a National Labor Relations Board to hear and determine cases in which it is charged that *this legal right is abridged or denied*, and to *hold fair elections to ascertain who are the chosen representatives of employees.*
>
> *"A better relationship between labor and management is the high purpose of this act. By assuring the employees the right of collective bargaining, it fosters the development of the employment contract on a sound and equitable basis.* By providing an *orderly procedure* for determining who is entitled to represent the employees, it aims to remove one of the chief causes of wasteful economic strife. *By preventing practices which tend to destroy the independence of labor, it seeks, for every worker within its scope, that freedom of choice and action which is justly his.*"

In its said Report, the Board itself, referring to the "Policy and Provisions" of the Act, declares:

> "The Act, both in *its substantive and procedural provisions, remedies the defects disclosed by experience under previous statutes, and at the same times makes no departure from traditional principles of substantive law or statutory administration.*
>
> "1. *Findings and policy.*—Section 1 of the act, after setting forth the *effect of unfair labor practices and labor disputes* upon the free flow of interstate commerce, *concludes in these terms, which summarize the theory underlying the entire statute:*
>
> "Experience has proved that *protection by law* of the *right of employes to* organize and *bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employes.*
>
> "It is hereby *declared to be the policy of the United States to eliminate the causes* of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by *encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.*"

The Board's said Report next proceeds to set forth and discuss the "Rights of Employees" as follows:

> "3. *Rights of employees.—Section 7 reaffirms* long recognized *fundamental rights* enjoyed by *American workers*, as follows:
>
> "*Employees shall have* the *right* to self-organization, to form, join or *assist labor organizations, to bargain collectively through representatives of their own choosing*, and to engage in concerted activities, *for the purpose of collective bargaining* or other mutual aid or protection.
>
> "SECTION 8 IMPLEMENTS THESE RIGHTS BY ENUMERATING AND PROHIBITING CERTAIN SPECIFIC UNFAIR LABOR PRACTICES BY EMPLOYERS. *These may be briefly summarized as follows* * * *

The precise provision of Section 8 (3) upon this subject is particularly noteworthy with reference to the special subject matter under present consideration. The proviso of the Section is that nothing in the Act, or in the National Industrial Recovery Act, etc., shall preclude an employer from making an agreement with a labor organization (*not established, maintained, or assisted by any action defined in this Act as an unfair labor practice*) *to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a) in the appropriate collective bargaining unit covered by such agreement when made.* It will be noted that *two conditions* are *here closely grouped together as the bases upon which closed shop agreements between the employer and the employees are authorized, namely, that the agreement be by a labor organization which is the representative of the employees in the appropriate collec-*

tive bargaining unit, elected under Section 9 of the Act; and, second, that such labor organization be not established, maintained or assisted by an unfair labor practice. Thus, even unto the detail of authorizing a closed shop agreement, the Act closely connects the representative chosen under Section 9 as the collective bargaining representative of the employees with the prohibition of unfair labor practices interfering with the rights and the independence of the employees, which collective bargaining is provided, by the Act, to protect and secure.

The Board's Report next takes up the subject of *Representatives and Elections*, upon which it states:

> "4. *Representatives and elections.*—Since *collective bargaining* is carried on *through representatives of employees*, the act follows *established precedents for the factual determination of such representatives. Section 9 (a) provides that representatives selected by the majority of employees in a unit appropriate for collective bargaining shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining. The act thus affirms the majority-rule principle, which is inherent in the practice of collective bargaining as in the practice of dealing through representatives generally, whether for governmental, corporate, or other purposes.*
>
> "Section 9 (b) authorizes the Board to determine in the appropriate case whether, in order *to insure to employees the full benefit of their right to self-organization and collective bargaining, and otherwise to effectuate the policies of the act*, the unit *appropriate for the purposes of collective bargaining* shall be the employer unit, craft unit, plant unit, or subdivision thereof.
>
> "In order to resolve in an orderly way doubts as to the *representatives of employees*, the Board is

specifically empowered to investigate questions concerning the representation of employees, *to conduct elections in appropriate cases*, and to certify to the parties the name or names of the *representatives that have been designated* (sec. 9 (c))."

In full and exact accord with the declaration of President Roosevelt in giving his approval to the Act, and with the declarations of the Board itself, above quoted, are the manifest Intent of the Statute and the uniform contributing purposes of its several Sections.

Every provision of the Act testifies unmistakably that *collective bargaining* by the employees, through representatives of their own choosing, with the employers, upon the vital subjects of wages, hours, and all other material conditions of employment, *is the prevention of and remedy for the evils and mischiefs which the Act was passed to suppress, including the prevention of and remedy for all forms of unfair labor practices which it proscribes.* Instead of, as the Board in its Petition contends, *separating* collective bargaining by the employees through independent representatives of their own choosing from prohibited unfair labor practices, whereby the Act would be divided into two different and independent subject-matters with respect to its policy, substance and remedies, and with respect to the status and functions of the Board under it, the Act *integrates inseparably the two subjects*, the provision and security of collective bargaining being the *principal* subject-matter, and the prevention of unfair labor practices, as adversely interfering with collective bargaining and the accomplishment of its avowed objects, being the *incidental* subject matter. Construed according to Lord Coke's leading and familiar canon of statutory construction, that is,

to suppress the mischief and advance the remedy, the Act, in all its closely connected and coherent statements of the evils to be overcome, its declarations of policy, the general and paramount remedy it provides, its ancillary and particular prohibitions to accomplish its general and principal purpose, its manifest intent that all its provisions, both affirmative and prohibitory, are deliberately correlated and designed to *effectuate* its policies by protecting the employees in the rights granted to them and prohibiting and preventing evils which destroy or threaten those rights, reveals its interrelated, integral and indivisible nature in its substantive, procedural and remedial features.

As President Roosevelt tersely, but effectively, stated:

> "This Act defines, as part of our substantive law, the *right* of self-organization of employees in industry for *the purpose of collective bargaining*, and provides *methods* by which the *Government can safeguard that legal right*."

In brief, the Act itself declares and demonstrates the close causal and remedial connection between collective bargaining by freely chosen representatives and the prevention of unfair labor practices, actually setting up such collective bargaining as the main means of preventing, and itself the potential prevention of, unfair labor practices denounced by the Act.

In full harmony, as above stated, with the elucidating declarations, above quoted, of the President and of the Board, are the title, the preambles or keynotes of Section 1, as well as the express literal enactments of Section 2, Section 7, Section 8, Section 9 and Section 10 of the Act, to which especial attention of the Court is here respectfully asked.

The following Sections of the Act, it is submitted, lend exceptionally strong support to the construction herein contended for on behalf of these Respondents:

Section 7 of the Act, captioned "Rights of Employees", provides:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing*, and to engage in concerted activities, *for the purpose of collective bargaining* or other mutual aid or protection."

Section 8 shows that the main and principal unfair labor practice proscribed and put down by the Act is any interference with the employees in the exercise of their right to bargain collectively through representatives of their own choosing or to organize in concerted activities for the purpose of collective bargaining. It is perfectly plain, therefore, that *the prevention* of unfair labor practices, involving, directly or indirectly, interference with the right of employees to bargain collectively through representatives of their own choosing, is basically and broadly intended for the protection and security of the employees in the free and full exercise of that right.

Section 8 (2), prohibiting the employer from interfering with the formation or *administration* of any labor organization, has also a perfectly apparent relation to the right of employees to bargain collectively through representatives of their own choosing for the purposes of collective bargaining, although not as close and direct as the relation of 8 (1) thereto.

Section 8 (3), in several respects, also has a plain and close relationship to the right of employees to bargain

collectively, declared in Section 7, inasmuch as "discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" would undeniably be an interference with employees' rights of collective bargaining through representatives freely chosen, guaranteed by Section 7. And the other respects in which Section 8 (3) is related to collective bargaining, secured by Section 7, with regard to closed shop agreements, and with relation to Section 9 (a), have hereinabove been pointed out. Section 8 (5) has in express terms to do directly with collective bargaining with the representatives of the employees, subject to the provisions of Section 9 (a).

Under the caption, and dealing with the subject of "Representatives and Elections", Section 9 (a), (b), (c) and (d) shows the integral connection between representatives and elections and unfair labor practices, demonstrating the uniform, pervading thesis of the Act to outlaw and repress various unfair practices as conflicting and interfering with the supreme right of the employees to designate and select, for the purpose of collective bargaining, representatives of their own choosing, and to "insure to employees the full benefit of their right" to collective bargaining and to effectuate the policies of the Act, and to take a secret ballot of the employees whereby they may designate and select their representatives for that purpose, and to secure a review, upon the entire record required to be filed under Sections 10 (f) and 9 (d), of an order of the Board aggrieving them and praying the Court to modify or set aside such order in whole or in part.

It is respectfully submitted that the aforegoing discussion cogently demonstrates that the *remedial and corrective jurisdiction* conferred by *Section 10* of the Act upon Courts of Appeals to review, and to enforce, modify or set aside, the orders of the Board is, by the supreme policy and the cardinal purpose of the Act, and the interrelation of all its provisions for the effectuation of its policy and purpose, fully commensurate with, and broadly covers and includes, *everything which the Act requires or prohibits for the effectuation of its policies and purposes*, and that, accordingly, the remedies, pursuant to review, which Section 10 authorizes and directs the said Courts to apply, are not limited and technical, but embrace the complete and harmonious enforcement of the whole Act, together with the fundamental law of the land, including every order of the Board, which finally affects employers, employees, organizations, individuals, or "persons", whose rights under or with respect to the Act are, in violation of it or the organic law, denied or impaired.

As "unfair labor practices" are denounced and prevented by the Act manifestly and undeniably for the purpose of protecting and securing the employees' right to bargain collectively through representatives freely chosen, in elections specially provided for that purpose, and as the objects of such collective bargaining are to protect the employees in their vital concerns of wages, hours of work, and all other conditions of employment, to which objects, and the interests of the employees therein, the prohibited unfair labor practices have direct and essential relation, it would be not only a violation of every sound precept of statutory construction, but, with great deference it is submitted, of plain, irresistible

common sense, to confine and restrict the jurisdiction of the Courts of Appeals, and the judicial remedies which that jurisdiction is conferred to provide, to merely the *subordinate and incidental* subject-matters of the Act, and utterly exclude from the whole sphere of such judicial remedy the *paramount and predominant rights* which it is the main purpose of the Act to vouchsafe to the employees, and, for the inviolate maintenance of which against denial or interference, the repression of unfair labor practices is commanded.

The immemorial canons of statutory construction conclusively sustain the construction and application of the Act here respectfully maintained, on behalf of Respondents, to be true, sound, legal and just. There is no more firmly settled or familiar canon of statutory construction than that the intent of the statute is to be ascertained from the whole statute, and that, when so ascertained, the intent is the statute, and will be read, wherever possible, harmoniously throughout the Act into all of its provisions.

In *Potter's Dwarris*, at pp. 188-189 (see also p. 184), it is said:

> "It is the most natural and genuine exposition of a statute, to construe one part by another part of the same statute, for that best expresses the meaning of the makers; and such construction is *ex visceribus actus*. And this construction of itself imports *ex vi termini*. * * *"

In 2 *Lewis' Sutherland, Statutory Construction*, 2nd Ed., Sec. 344, pp. 659-660, it is said:

> "It is to be presumed that all the subsidiary provisions of an act harmonize with each other, and with

the purpose of the law; if the act is intended to embrace several objects, that they do not conflict. Therefore, it is an elementary rule of construction that all parts of an act relating to the same subject should be considered together, and not each by itself. *By such a reading and consideration of a statute its object or general intent is sought for, and the consistent auxiliary effect of each individual part.* Flexible language which may be used in a restricted or extensive sense will be construed to make it consistent with the purpose of the act and the intended modes of its operation as indicated by such general intent, survey and comparison—*ex antecedentibus et consequentibus fit optima interpretatio.*"

To the same effect are Sections 348, 363 and 364. In Section 363, pp. 693-5 of the same volume of the same Work, it is said:

> "The intent of a statute is the law.—If a statute is valid it is to have effect according to the purpose and intent of the law maker. * * * In construing statutes the proper course is to start out and follow the true intent of the legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature.' "

See also:

Section 364, pp. 696-7; Section 368, pp. 706-7; Sections 369, 380 and 444.

Endlich on the Interpretation of Statutes, Sections 27, 29, 103, 295 and 339.

59 *Corpus Juris*, Statutes, pp. 961 and 993.

As shown above, the construction of the Act contended for by the Board divides the Act itself into two entirely separate and radically different parts—one, those provisions of the Act applicable to unfair labor practices by

employers as to which the Board contends the right and remedy of judicial review exists; and two, separate and different from the first, that part of the Act which secures to employees their vital and paramount rights of choosing the representatives for collective bargaining as to which the Board contends there is no remedy and no relief afforded by the Act to protect, secure and enforce such cardinal rights of the employees. This is not only an anomalous construction of the Act, but would leave the Act in an anomalous state, making its administration unfair and ineffective with respect to the rights of the *employees* in the Board's dealings with *them*, whilst effective as to the rights of the Board in dealing with *employers*. An appropriate characterization of the Board's position in this respect is found in the language of Mr. Chief Justice WHITE in *Pennington v. United States*, 231 U. S. 631, who said, in rejecting a construction sought to be placed upon a federal statute:

> "In other words, the only avenue of approach for the proposition is through a gateway created by *wrenching the provision asunder*. We are of opinion that this may not be done. (*White v. United States*, 191 U. S. 545; *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174). * * * things may not be so associated as one for the purpose of securing the enactment of legislation upon the theory that they are one, and when enacted be disassociated for the purpose of judicial construction so as to cause them to be wholly independent of one another."

And it is, of course, a firmly established canon of construction that the *intention* of the law-maker is to be deduced from the *whole statute and every material part* of the same. *United States v. Fisher*, 2 Cranch 358; *United States, ex rel. Parrish, v. MacVeagh*, 214 U. S. 124; *Great*

Northern R. Co. v. United States, 208 U. S. 452; *Home Sav. Bank v. Des Moines*, 205 U. S. 503; *Blair v. Chicago*, 201 U. S. 400; *Lockwood v. Exchange Bank*, 190 U. S. 294; *Earle v. Carson*, 188 U. S. 42.

See also, for other expressions and applications of the principles of construction above stated:

Postmaster General v. Early, 12 Wheat. 136
Wood v. United States, 16 Pet. 342
Peck v. Jenness, 7 How. 612
Brown v. Duchesne, 19 How. 183
Heydenfeldt v. Daney Gold, etc. Co., 93 U. S. 634
Red Bird v. United States, 203 U. S. 706
Ross v. McIntyre, 140 U. S. 453
Fasulo v. United States, 272 U. S. 620
Talbott v. Silver Bow County, 139 U. S. 438.

B.

Apart from the reasons discussed hereinbefore, Section 10 (f) of the Act conferred jurisdiction upon the Court below to review the Board's Order, operating so destructively upon Respondents' cardinal rights under the Act. The construction of said Section, contended for by Petitioner, against judicial review, under the Act, of said Order, would unconstitutionally deprive Respondents of their valuable rights, and would make the Act, so applied, violative of the Fifth Amendment.

As the Board's Order illegally and finally deprived the Respondents of basic rights given them by the Act for their benefit and for the effectuation of the policy of the Act, it is respectfully contended that said Order was, under the plain terms of Section 10 (f) of the Act, which confers exclusive and comprehensive appellate jurisdiction upon Courts of Appeals, properly reviewable by the

Court below. If the words of that Section are given their natural meaning it would seem beyond question that the Court below clearly had jurisdiction under it, because Respondents were persons "aggrieved" by an "Order" of the Board which irretrievably denied to and deprived them of valuable personal and property rights, and denied "in whole" the relief they sought from the Board in their letter and Petition of February 11 (R. 17) to it and in their oral argument before it on February 24, 1939. And, inasmuch as the Sixth Circuit, throughout which the jurisdiction of the Court below extends, embraces Michigan, where both Respondents "reside or transact business", the Court below plainly had jurisdiction as provided by Section 10 (f).

Petitioner contends that the Act, Section 10 (f), confers jurisdiction upon Courts of Appeals to review *only* cease and desist orders *against employers* made in unfair labor practice cases. One obvious answer to that contention is that there is no express language in Section 10 (f) limiting or restricting the broad grant of jurisdiction to review contained therein to only such orders as Petitioner contends are reviewable, and it would require an artificial and strained interpretation of, and an unwarranted interpolation of words into, the plain language of the Section to transmute the words *"a final order of the Board granting or denying"* etc., into the words *"a final cease and desist order of the Board against an employer in an unfair labor practice case granting or denying"* etc. If Congress had intended to limit and restrict the jurisdiction of the Courts of Appeals to the review of only a cease and desist order against an employer in an unfair labor practice case, it would have used appropriate words of limitation and

restriction to that effect upon the comprehensive language of Section 10 (f). As the Court below, in denying the Board's contention on this point, so cogently stated (R. 55):

> "Finally, it is said (by the Board) that the phrase 'Wherein the unfair labor practice in question was alleged to have been engaged in' found in Sec. 10 (f), limits the right of judicial review to procedure involving unfair labor practices only, as described in Sec. 10 of the Act. It certainly permits a review of the procedure in such character of controversy *but does not confine it thereto.*
>
> "The Supreme Court did not so limit it in *Edison Co. v. Labor Board*, 305 U. S. 197, 226. See also the discussion touching jurisdiction under Sec. 10 (f) found in *In re Labor Board*, 304 U. S. 486, 493; and in *Ford Motor Co. v. Labor Board*, 305 U. S. 364, 369."

In *Ford Motor Co. v. National Labor Relations Board*, 305 U. S. 364, this Court, through Mr. Chief Justice HUGHES, in construing Section 10 (f) of the Act said (p. 369):

> "While Section 10 (f) assures to *any aggrieved person* opportunity to contest the Board's Order, it does not require an unnecessary duplication of proceedings. The aim of the Act is to attain simplicity and directness both in the administrative procedure and on judicial review. * * * *The breadth of the jurisdiction conferred upon the court to set aside or modify in whole or in part the Board's Order, or to permit new evidence to be taken, necessarily implies that the party proceeded against is entitled to raise all pertinent questions and to obtain any affirmative relief that is appropriate.* * * *"

Furthermore, the position and contention of Petitioner that no right of review of its own violations of Section

9 (a) and (c) exists in such a case as this, where the *employees* have been denied their vitally paramount right of election of a representative of their own choosing for collective bargaining, and that the *only* right of review is one relating solely and exclusively to questions of unfair labor practices by *an employer*, would leave the Act in the anomalous state of providing remedy by court review for only unfair labor practices by the *employer*, and of utterly failing to provide remedy respecting the *rights of employees* which the Act secures and declares to be as of supreme importance to *them*. *In other words, the Board contends that violations of the Act against employees upon the Board's own part are not subject to remedy by judicial review, and may not be remedied or relieved against, within the provisions of the Act.* The position of the Board is that *employees*, who can not, under the provisions of the Act, commit unfair labor practices, but *against whom the Board may violate the provisions of the Act*, are *without remedy against the Board*; that the Board may enforce relief against *employers*, and *employers* may challenge the action of the Board in that respect, *but that no matter how illegally the Board may act in dealing with the rights of employees, the latter may not, within the provisions of the Act, hold the Board accountable or within judicial control.* It is submitted that every conception of justice, as well as every fair interpretation of the Act, must instinctively reject such a contention. The construction of the Act so contended for by the Board would make the Act, as applied to a situation such as the one in this case, unconstitutional as in violation of the due process clause of the Fifth Amendment to the Constitution of the United States.

I. B. E. W. v. National Labor Relations Board, 305 U. S. 197; 232-233; 233.
Morgan, et al., vs. United States, 304 U. S. 1.
St. Joseph Stock Yards v. United States, 298 U. S. 38.
Morgan v. United States, 298 U. S. 468.
Southern R. Co. v. Virginia, 290 U. S. 190.
Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S. 287.
Turner, et al., v. Wade, etc., 254 U. S. 64, 70.
Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418, 457, 458.
Interstate Commerce Comm. v. Louisville & N. R. Co., 227 U. S. 88.

Moreover, the construction contended for by the Board arbitrarily *divides* the Act itself into *two* entirely separate and radically different parts, first, those provisions of the Act which the Board, in its unaccountably narrow view of the Act itself, holds only applicable to *unfair labor practices by employers*, as to which the Board concedes the right and remedy of judicial review exist; and second, separate and different from the first, that part of the Act which secures to *employees* their vital and paramount rights of choosing their representatives for collective bargaining, as to which the Board contends there is no remedy and no relief afforded by the Act to protect, secure and enforce such cardinal rights of employees, which the contention of the Board most strangely and repulsively maintains are entirely subject to the discretionary, arbitrary, ultimate and irreviewable determination and fiat of the Board alone. This is not only at war with every conception of American law, and not only an anomalous construction of the Act, but would emasculate the Act to a semi-abortive state, leaving its

administration ineffective with respect to the rights of the *employees* in the Board's dealings with *them*, whilst effective only with respect to the rights of *employers* and the *powers of the Board* in controversies arising *between them*.

It is submitted that this contention of Petitioner is *condemned*, and that the contention made by Respondents, as Petitioners in the Court below, for relief, protection and remedy against violations and denial of their vital rights under Sections 7 and 9, and under the policy of the Act, is *sustained*, by the broad, plain provisions of Section 10 (f) of the Act, which give the right, unrestrictedly, to any person aggrieved by a final order of the Board, granting or denying in whole or in part the relief sought, to obtain a review of such order.

I. B. E. W. v. National Labor Relations Board, 305 U. S. 197; 232-233; 233; 234-235; 236-237.

National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U. S. 1; 32-34; 42; 42-45.

In re Labor Board, 304 U. S. 486, 493.

Ford Motor Co. v. National Labor Relations Board, 305 U. S. 364, 369.

Texas & New Orleans R. Co. v. Brotherhood of R. etc. Clerks, 281 U. S. 548.

Virginian R. Co. v. System Federation No. 40, 300 U. S. 515.

Federal Power Comm. v. Pacific Power & Light Co., et al., 307 U. S. 156.

Rochester Telephone Corp. v. United States, 307 U. S. 125.

United States v. Maher, etc., 307 U. S. 148.

Federal Radio Comm. v. Nelson Bros. Bond & Mtge. Co., 289 U. S. 266.

American Sumatra Tobacco Corp. v. Securities and Exchange Comm., 98 F. (2) 236 (Ct. App. Dist. Col.).
Heitmeyer v. Federal Communications Comm., 95 F. (2) 91 (Ct. App. Dist. Col.).
Pacific Power & Light Co., et al., v. Federal Power Comm., 98 F. (2) 835 (C. C. A. 9).

C.

The Congressional Reports relied on by Petitioner have no relation to and do not support its construction of the Act against the right of Respondents to Judicial Review thereunder of the Direction of "Election," but said Reports show merely a legislative intention to restrict Judicial Review only as against procrastinating and objectionable tactics of employers, and relating to orders providing for elections, and not to orders denying and preventing elections and illegally and finally denying employees their vital rights involved therein.

Petitioner seeks to justify the construction it places upon the Act against the right of Respondents to judicial review thereunder of the Direction of "Election" by quotations from the Reports of the Committees of the Senate and House of Representatives which considered the Bill which became the National Labor Relations Act. It is submitted, however, that those Reports merely demonstrate that, whatever limitations were intended by Congress to be placed upon the rights of *employers* to judicial review under the Act of *election* orders, not the least intention is expressed in, or may be implied from, said Reports to deny or proscribe the rights of *employees*, as persons aggrieved within the broad language of Section 10 (f) of the Act, to judicial review of orders of the Board *illegally denying, instead of providing for, elections* of representatives for collective bargaining.

That the intent of Congress upon the subject was to prevent *employers* and *companies* from interposing vexatious and procrastinating appeals from orders *directing elections* is the plain and true purport of the texts of the Reports selected and quoted by Petitioner; but any intent to deny to *employees* the right to review, by the Courts of Appeals, under the Act, of orders of the Board depriving such *employees*, by means of an *illegal device improperly designated by the Board* an *"election"*, of vital rights specifically designed to secure to them their basic and principal right under the Act, is not even intimated in the Reports of either of the Branches of Congress.

For example, in the Report of the House Committee (H. Rept. 1147, 74th Cong., 1st Sess., pp. 6-7) referring to the procedure providing for judicial review under Public Resolution 44, 73d Cong., 2d Sess. (48 Stat. 1183) of election orders of the Old Board, it is said:

> "The weakness of this procedure is that under the provision for review of election orders *employers* have a means of holding up the *election* for months by an application to the circuit court of appeals.
> * * *
> "The *election* is but a preliminary determination of fact, and there is no reason why *employers* should have an opportunity for court review prior to the holding of the *election*. The ability of *employers* to block *elections* has been productive of a large measure of industrial strife. When an employee organization has built up its membership to a point where it is entitled to be recoginzed as the representative of the employees for collective bargaining, and the *employer* refuses to accord such recognition, the union, unless an election can promptly be held to determine the choice of representation, runs the risk

of impairment of strength by attrition and delay while the case is dragging on through the courts, or else is forced to call a strike to achieve recognition by its own economic power. * * *"

The Report of the Senate Committee on Education and Labor, S. Rept. 573, 74th Cong., 1st Sess., pp. 5-6, declares that:

"Under Public Resolution 44, any attempt by the Government to conduct an *election of representatives* may be contested *ab initio* in the courts, although such election is in reality merely a preliminary determination of fact. * * * After almost a year not a single case, in which a *company* has chosen to contest an *election* order of the Board, has reached decision in any circuit court of appeals."

In the Report of the House Committee above referred to, after referring to actual cases, it is said (p. 7):

"* * * The *companies* in these cases had made every preparation to wage a war with striking employees, *rather than to submit to the orderly democratic process of a governmentally supervised election to determine by whom the employees desired to be represented in collective bargaining negotiations.*"

The position of the Board, in so far as it relies upon the language contained in the Congressional Reports above quoted from, is plainly based upon the false premise that the Order in the instant case is identical with those referred to in said Reports, namely, an order *providing for* an election by employees of representatives, *designated and selected by their own free choosing*, for collective bargaining, or, as stated in the House Report, an "orderly *democratic process* of a governmentally su-

pervised *election*"; whereas in fact, as shown hereinbefore, the Order complained of and which was directed to be set aside by the Court below does *not* "direct an *election*" at all, but *effectually denies and prevents an "election" in any established, just or legal sense of the term.* So that, whatever may be said of the contents of the Reports above referred to as limiting or restricting the right to judicial review under the Act, the manifest reference of Congress was to the *democratic process of election*, and orders passed *therefor*, and *not* to such an Order, as is here involved, which neither directs nor provides *for an election*, but *denies* it and its essential rights and elements.

The submission by Petitioner of said Reports in support of its contentions simply begs the question, because the very question presented for decision below was whether the so-called "election" was an election at all within the meaning of the Act and its purpose and policy, and within the admitted meaning that Congress, following well established and familiar principles, intended to impute to the word *election*.

The definitions of the word "election" (*supra*, pp. 24 to 26), convey the accepted and established meaning of the word, and Congress must certainly be taken to have intended its accepted and established meaning when it employed the word "election". In its accepted and established sense it is true that, as stated in the excerpt quoted above from the Senate Report, "An election is the mere determination of a preliminary fact, and in itself has no substantial effect upon the rights of the employers or employees", but when, as here, one of the candidates is denied and deprived of the right to appear

upon a ballot to be used at an "election", and the right is denied to the voting employees to *express* their choice for a representative "*of* their own choosing", then, it is respectfully submitted, such "election" is *not* the mere determination of a preliminary fact, or any fact at all, but *is* a determination denying and destroying rights not only of eligible electors—in this case the eligible employees—but also of eligible candidates, including in this case the Respondent, the Brotherhood Local, whose name was excluded from a place upon the ballot.

D.

The Board's Second Direction of Election was a final order which conclusively and irretrievably denied to and deprived Respondents of their personal and property rights to their irreparable injury.

The fact that the Second Direction of Election was not called by the Board either an order or a final order did not and could not have affected its nature or its finality. Just as an interlocutory or preliminary direction will not be converted into a final order simply by characterizing it as such, a final order may not be made an interlocutory, preliminary or procedural one by designating it a decision or direction. The true test of finality, adhered to in the federal decisions from the inception of the rule in this Country that only final orders will be reviewed on appeal, is that whether an order or decree is final is not to be determined by the name by which it is called, but by its substance, its inherent nature and its effect.

The Second Direction of Election was an Order because it promulgated a rule, a regulation and a command, and

ordered, directed and required what it promulgated to be carried out. It was definitive, rather than preliminary or procedural, because it determined absolutely and conclusively, and ordered, directed and required, how the run-off "election" was to be held and how the ballot to be used at the run-off "election" was to read, that is, with a choice on it for or against the CIO Union, and with the name of the Respondent, the Brotherhood Local, entirely excluded and omitted therefrom. It was definitive, moreover, in so far as Respondents were concerned, because there was no further procedure or step that could have been taken by Respondents under the Act or the Board Rules and Regulations to alter, change or vary the terms and provisions of the Supplemental Decision and Second Direction of Election. All possible remedies within the Act and the Rules and Regulations had been resorted to and exhausted, except the remedy provided for review by the Court below. The Second Direction of Election was not preliminary because, under its mandate and requirements, the rights of Respondents, in so far as any possibility existed of becoming the representative for collective bargaining at the "election" to be held for that purpose, were terminated. The holding of the so-called run-off "election", whether the CIO Union would have won or lost, and whether or not the Board would ever have been called upon to certify the CIO Union as representative, could not possibly have affected or changed the altered position of Respondents as it was affected by the Board's Order, in so far as their rights were concerned. No further step which might have been taken by anyone before the Board would have made the position of Respondents any more or less mature than it became by virtue of the operation and affect

of the Supplemental Decision and Second Direction of Election.

The Supplemental Decision and Second Direction of Election were entered and issued in a proceeding which was clearly adversary in character, in that the contentions and application of Respondents as to the manner and form of the run-off "election", as stated in their letter and petition of February 11, 1939, and in the oral argument in their behalf before the Board, were opposed by the Board itself as well as by their competitor for the position of representative for collective bargaining, the CIO Union, as is shown in the letters to the Board in its behalf of February 2 and February 6, 1939, *requesting a ballot in the run-off election for or against the CIO Union.*

In its Petition for Certiorari the Board (p. 11) refers this Court to the Memorandum filed by it in *American Federation of Labor v. National Labor Relations Board*, No. 70, *supra*, in which the Board, in an extended argument, in contending that the *certification* involved in that case was not judicially reviewable under the Act, maintains that administrative action which affects rights only on the contingency of future administrative action, or which does not command that anything be done or not done, is not reviewable judicially, citing, in support of that position, *United States v. Los Angeles, etc., R. Co.*, 273 U. S. 299, which case was cited and relied upon in the Court below by Petitioner in the instant case.

As shown hereinabove, the *American Federation of Labor* case is clearly distinguishable from the one at bar in several important respects which will not be repeated here. It is further respectfully submitted that the *Los*

Angeles Railroad Company case, in which review of a finding of the Interstate Commerce Commission was sought under the Urgent Deficiencies Act, is clearly inapplicable for a number of reasons. First, the Court there said, concerning a *valuation finding* of the Commission, that it was "merely preparation for *possible action* in some proceeding which *may be instituted* in the future". In the instant case the Supplemental Decision and Second Direction of Election were entered and issued *as a result* of a proceeding distinctly adversary in its nature, which proceeding was instituted, heard and determined prior to the entering and issuing of the same, and the only things which remained to be done thereafter were ulterior proceedings (wherein Respondents were actually and finally deprived of their rights under the Act) to carry out and execute the mandate of the Board. In the *Los Angeles* case, counsel for it conceded that the finding there did *not* require the Railroad Company to "*do or refrain from doing some specific thing*", the contention there being that such a direction was not necessary (see argument for Company in that case, 273 U. S. 299, 303). In that case, to quote the language of the Court, the finding did not "grant or *withhold any authority, privilege or license*", nor "*extend or abridge any power or facility*", nor "*change the carrier's existing or future status or condition*", nor "*determine any right or obligation*". *In the case at bar, the Board's Order does all of those things.*

Equally as important, as a distinguishing factor between the *Los Angeles* case and the case at hand, is the fact that the provisions of the Urgent Deficiencies Act of 1913 (28 U. S. C., Secs. 45 and 47a), under the provisions of which review of the Commission's findings was there sought, are not at all analogous to Section 10 (f) of the

Act here. Nor is the Commerce Act comparable to the National Labor Relations Act, because the former contains no provision whatsoever for review. In cases construing review provisions similar to those in the Act here involved, such as *Federal Power Commission v. Pacific Power & Light Co., et al.*, 307 U. S. 156, and *American Sumatra Tobacco Corp. v. Securities and Exchange Commission*, 93 F. (2) 236, in which the doctrine of negative orders, under the *Los Angeles* case and other cases under the Urgent Deficiencies Act, was advanced and relied upon by administrative boards in opposition to judicial review, the obvious differences between the Commerce Act and the Urgent Deficiencies Act, on the one hand, and administrative acts *containing within them* review provisions, on the other, have uniformly impelled the Courts to reject, as not even persuasive, such decisions concerning orders or findings of the Interstate Commerce Commission. In the *Pacific Power & Light Company* case, *supra*, the Court, speaking through Mr. Justice FRANKFURTER, said:

> "But the Power Act *contains* a distinctive formulation of the conditions under which resort to the Courts may be made and Congress determines the scope of jurisdiction of the lower federal courts. * * * Thus the *statutory scheme* of the Power Act only reinforces the analysis made in the *Rochester* case."

See also:

Rochester Telephone Corp. v. United States, 307 U. S. 125.

E.

The finality of the Second Direction of Election, for purposes of its reviewability under the provisions of the Act, is determinable by its actual operation and effect, and the substantiality of the rights which it abridges or denies.

The fact that the so-called run-off "election" had not been held, and that there remained to be done certain administrative or procedural acts before the completion of the investigation being conducted by the Board, in no wise detracted from the intrinsic nature and effect of the Second Direction of Election, or from its finality within the meaning of the words "final order" used in the Act. The authorities are in entire accord on that proposition.

In what is perhaps the leading case on this subject, *Forgay, et al., v. Conrad*, 47 U. S. 201, this Court, speaking through Mr. Chief Justice TANEY, affirmed the rule that the words "final decrees", used in acts of Congress relating to the reviewability of decisions of lower courts, are to be given a liberal and reasonable construction, and that if an order be final upon the merits of a matter in dispute, and may not be reconsidered or modified by the Court passing it, in relation to the matters decided, although there remain in the cause further or ulterior proceedings, such order is nevertheless final and appealable, particularly if irreparable injury will result to the aggrieved party, from the operation of such order, during the pendency of such ulterior proceedings.

In *United States v. River Rouge Co.*, 269 U. S. 412, this Court, speaking through Mr. Justice SANFORD, said (p. 414):

> "While the general rule requires that a judgment of a federal court shall be final and complete before it may be reviewed on a writ of error or appeal, it is well settled that an adjudication final in its nature as to a matter distinct from the general subject of the litigation and affecting only the parties to the particular controversy, may be reviewed without awaiting the determination of the general litigation. *Williams v. Morgan*, 111 U. S. 684, 689; *Collins v. Miller*, 252 U. S. 364, 371; *Arnold v. Guimarin*, 263 U. S. 427, 434. And so, conversely, an adjudication final in its nature as to the general suject of the litigation may be reviewed without awaiting the determination of a separate matter affecting only the parties to such particular controversy."

In *Thompson v. Dean*, 74 U. S. 342, the decision of this Court, per Mr. Chief Justice CHASE, denying a motion to dismiss the appeal, was to the same effect, as are the decisions of this Court in:

Clark v. Willard, 292 U. S. 112.
Wilson v. Republic Iron Co., 257 U. S. 92.
Waco v. U. S. Fidelity Co., 293 U. S. 140.
Bandini v. Superior Court, 284 U. S. 8.
Gulf Refg. Co. v. United States, 269 U. S. 125.
North Car. R. R. Co. v. Story, 268 U. S. 288.
Central R. R. Co. v. United States, 257 U. S. 247.
Detroit, etc. Ry. Co. v. Michigan R. Comm., 240 U. S. 564.
McAllister v. C. & O. Ry. Co., 243 U. S. 302.
Wecker v. Nat'l. Enameling Co., 204 U. S. 181-182.

And see also:

St. Louis, etc., R. Co. v. Southern Express Co., 108 U. S. 24.
Hill v. Chicago & Evanston R. Co., 129 U. S. 170.
Mowrer v. Fletcher, 114 U. S. 127.
Bronson v. Railroad Co., 67 U. S. 524.
Winthrop Iron Co. v. Meeker, 109 U. S. 180.
Lewisburg Bank v. Sheffey, 140 U. S. 445.
Wheeling & Belmont Bridge Co. v. Wheeling, 138 U. S. 287.
Ormsby v. Webb, 134 U. S. 47.
Ex Parte Norton, 108 U. S. 237.
O'Dowd v. Russell, 81 U. S. 402.
French v. Shoemaker, 79 U. S. 86.

In *Rose on Fed. Juris. & Proc.* (4th Ed.), Sec. 651, it is said on this subject:

"Our Courts have tried to make the test a *practical* one. They are inclined to hold a decree or order final and therefore, appealable, *if it requires something to be done which takes aught of substantial value from one of the parties, and if that which is commanded cannot be undone by any subsequent reversal.* * * * Speaking generally, however, whether a decree is final or not will be tested rather by *what will be its actual working than by purely theoretical considerations.*"

In 4 *Foster Fed. Pr.*, Section 695, p. 3740, *et seq.*, are given many examples of orders, analogous to that in the instant case, which were held to be final and reviewable on appeal.

In *Zoline on Fed. Appellate Jur. & Proc.* (3rd Ed.) p. 18, it is said:

"* * * An adjudication is final and appealable if it involves a determination of a substantial right

against a party in such a manner as leaves him no adequate relief except by appeal * * * Whether a decree is final or interlocutory depends upon its essential purport and effect and not upon its characterization in the proceedings (*Simmons v. Grier Bros. Co.*, 258 U. S. 82). * * *"

See also:

Montgomery's Manual of Fed. Juris. and Proc., (3rd Ed.), Section 1011.

CONCLUSION.

Accordingly, it is respectfully submitted, for the Respondents herein, that the Petition of the National Labor Relations Board for a Writ of Certiorari should be denied.

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